93-543

Supreme Court U.S.
FILED
SEP 27 1993
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

GOLDSTEIN & BARON, CHARTERED, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LEONARD R. GOLDSTEIN
4321 Hartwick Road
Suite 300
College Park, MD 20740
(301) 699-9880
Counsel of Record

LEONARD R. GOLDSTEIN
PATRICIA ANN JOHNSON
4321 Hartwick Road
Suite 300
College Park, MD 20740
(301) 699-9880
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the distinction claimed by the Internal Revenue Service ("IRS") between rebate erroneous refunds and non-rebate erroneous refunds is unfounded, thus requiring it to either timely file suit for recovery or make a new assessment in the event of a claimed erroneous refund?
2. Whether the Fourth Circuit appropriately considered of the issue of waiver in light of overwhelming case law holding to the contrary?
3. Whether the holding of the Fourth Circuit that a taxpayer waives its right to object to the collection of a refund when it questions its entitlement to the refund conflicts with case law, IRS regulations and the common law?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Goldstein & Baron, Chartered, and the Respondent United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
OPINIONS BELOW.....	2
JURISDICTION.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT....	10
I. There is a conflict among federal courts regarding the validity of the distinction which the IRS attempts to make between a rebate erroneous refund and a non-rebate erroneous refund.....	10
II. The Court's consideration of the issue of waiver was clearly erroneous and contrary to case law authority.....	19
III. The Court's finding that the Taxpayer waived its right to object to the collection of the refund is in direct contradiction to well established law.....	20
CONCLUSION.....	24

APPENDIX A (Memorandum and Order of the United States District Court for the District of Maryland..... 1a

APPENDIX B (Opinion and Judgment of Court of Appeals for the Fourth Circuit..... 1b

APPENDIX C (Order denying Rehearing)..... 1c

APPENDIX D (Statutes - Internal Revenue Code of 1986 (26 U.S.C.)..... 1d

TABLE OF AUTHORITIES

Cases:

Armstrong v. Baker, 394 F.Supp. 1380 (N.D.W.Va.1975)..... 20

Atlas Assurance Co. v. Standard Brick & Tile Corp, 264 F.2d 440 (7th Cir.1959)..... 20

Brookhart v. Janis, 384 U.S. 1 (1966)..... 23

Dairyland Ins. Co. v. Hughs, 317 F. Supp 928 (W.D. Va. 1970). 20

Davenport v. United States, 91-2 U.S. Tax Cas. (W.D.Ky. 1991).....12,15, 17

Page

Goldstein, Baron & Lewis v. United States, 70 A.F.T.R. 2d 92-5207..... 2,13

Goldstein, Baron & Lewis v. United States, 995 F.2d 35 (4thCir.1993)..... 2,10

Groetzinger v. Commissioner, 69 T.C. 309 (1977).....12,15, 17

Johnson v. Zerbst, 304 U.S. 458 (1938)..... 23

La Follette v. United States, 176 F. Supp 192 (S.D. Calif.1959).....13,17

Philadelphia & Reading v. United States, 944 F.2d 1063 (3rd Cir. 1991)..... 25

Phoenix Assurance Co. of New York v. Appleton City, 296 F.2d 787 (8th Cir. 1961)..... 19

Rodrigues v. United States, 629 F.Supp 333 (N.D. Ill. 1986).....13,17

Sanfellipo v. United States, 90-2 U.S. Tax Cas. (N.D. Calif. 1990).....12,15, 17

Page

United States v. Brown,
782 F.Supp. 321
(N.D. Tex.1990).....13,17,
18

United States v. Cook, 494 F.2d
573 (5th Cir. 1974)..... 22

United States v. Wilkes,
946 F.2d 1143
(5th Cir.1991).....9,12,
15,17,18

United States v. Young,
79-2 U.S. Tax Cas.
(D. Del. 1979)..... 13,17

Miscellaneous:

Federal Rules of Civil
Procedure 8(c)..... 19

26 U.S.C. 6501.....8,13,
16

26 U.S.C. 6501(a)..... 16

26 U.S.C. 6502..... 13

26 U.S.C. 6502(a)..... 21

26 U.S.C. 6532(b)..... 13

28 U.S.C. 1254..... 3

28 U.S.C. 1346(a)..... 2

Page

Internal Revenue Manual I.R.M. 3(17)(79) 12.2:3..... 12

Internal Revenue Manual, General Counsel Mmemorandum G.C.M. 36624 (March 11, 1976)..... 12

5 S. Williston, Law of Contracts Section 678 (3rd ed. 1961). 23

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

****

GOLDSTEIN & BARON, CHARTERED, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT

****

The petitioner, Goldstein & Baron, Chartered (formerly Goldstein, Baron & Lewis, Chartered) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on June 29, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 995 F.2d 35 (4th Cir. 1993).

The decision of the United States District court for the District of Maryland appears at 70 A.F.T.R.2d 92-5207 (D. Md. 1992).

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. 1346(a), the Petitioner brought this suit in the United States District Court for the District of Maryland. On June 18, 1992, the District Court issued a memorandum and order granting summary judgment to the appellee, Goldstein & Baron, Chartered (formerly Goldstein, Baron & Lewis, Chartered), and judgment was entered on August 3, 1992.

On Respondent's appeal, the Fourth Circuit entered a judgment and opinion reversing the District Court's opinion and order on June 4, 1993. Petitioner filed for rehearing which was denied on June 29, 1993.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. section 1254.

STATEMENT OF THE CASE

Plaintiff, Goldstein and Baron, Chartered ("the Taxpayer"), formerly known as Goldstein, Baron & Lewis, Chartered,[1] in October 1985, filed its third quarter 1985 ("3Q85") Form 941 accurately reporting the following:

---

[1] When the Taxpayer filed its suit, it was known as Goldstein, Baron & Lewis, Chartered. Subsequently, with the departure of one of its partners, the Taxpayer's name was changed to Goldstein & Baron, Chartered, the name of the Petitioner in this matter.

Withholding Tax	$ 16,909.00
Social Security Tax	11,831.35
TOTAL TAX	$ 28,740.35
Deposits	27,212.36
DUE	$ 1,528.00

(paid by check)

The Internal Revenue Service ("IRS") erroneously recorded the return as if it had reported a total liability of $11,831.35, with deposits of $27,212.36, hence an overpayment of $15,381.01. Accordingly, before the end of 1985, the IRS assessed Taxpayer's 3Q85 liability as $11,831.35 and credited the Taxpayer with $15,381.01 on its fourth quarter 1985 ("4Q85") liability.

In January 1986, the Taxpayer, unaware of the IRS error, timely filed its 4Q85 Form 941 accurately reporting the following:

Withholding Tax	$ 17,682.00
Social Security Tax	13,434.72
TOTAL TAX	$ 31,116.72
Deposits	31,136.16
OVERPAID	$ 19.44

On February 17, 1986, the IRS refunded to the Taxpayer the following for 4Q85:

Erroneous Refund	$15,381.01
(Credited from 3Q85)	
Interest	33.79
Actual 4Q85 over-payment	+ 19.44
TOTAL	$ 15,434.24

By letter of March 6, 1986, the Taxpayer inquired of IRS as to why it had received a refund. The IRS was unable to determine what had happened. In early 1988, however, the IRS apparently discovered its original error. By that

time, the mistake had been compounded by subsequent IRS errors.

In the first week of February 1988, the IRS made the following entries on its records without making any assessments:

(1) The $15,381.01 payment was removed from 4Q85.

(2) The IRS applied the $15,381.01 to 3Q85.

(3) The Taxpayer's account for 4Q85 showed a $15,381.01 underpayment.

(4) The Taxpayer's account for 3Q85 was adjusted to show a $15,381.01 liability offset by the application of $15,381.01 from 4Q85 to show a zero balance.

The IRS then issued a notice dated February 15, 1988, which it mailed to the Taxpayer on February 22, 1988, demanding repayment of the erroneously refunded

$15,381.01 for 4Q85. In March of 1988, the Taxpayer paid the $15,381.01 under protest.

On October 3, 1989, the Taxpayer filed a claim for refund as required by IRS regulations. This claim was denied. Subsequently, on February 14, 1990, the Taxpayer brought suit for the return of the disputed funds.

After discovery, the parties entered into stipulations of facts and filed cross-motions for summary judgment. During oral argument on the motions for summary judgment, Judge Marvin J. Garbis reframed the issue to be decided as whether a <u>new</u> assessment for the fourth quarter of 1985 had to be made before the IRS could collect the $15,381.01. Judge Garbis asked the parties to submit supplemental briefs addressing that issue.

In its supplemental brief, the Taxpayer stated that a new assessment was a prerequisite to collection of an underpayment, since its payment of the tax had extinguished the prior assessment. Because the IRS had failed to make such new assessment before the limitations period in section 6501 had expired, the Taxpayer was entitled to a return of the $15,381.01. This is a position supported by decisions from the Fifth Circuit and United States District Courts in Texas, Illinois, Delaware, and California.

The IRS took the position that no new assessment needed to be made because the earlier assessment was not extinguished as the matter involved a "non-rebate" refund, and that the entire line of cases holding to the contrary were in error. The IRS further argued that because the Taxpayer

had returned the $15,381.01 on March 30, 1988, during the time in which a new assessment could have been made or suit could have been filed, the Taxpayer could not recover the funds.

In his Memorandum and Order dated June 17, 1992, Judge Garbis rejected the IRS arguments and ruled in accordance with existing case law, citing, in particular, United States v. Wilkes, 946 F.2d 1143 (5th Cir. 1991). In doing so, Judge Garbis relied upon the Wilkes Court's determination that "[t]he weight of authority holds that once a taxpayer makes payment on a tax assessment, the payment extinguishes the assessment to the extent of payment, and subsequent refunds do not revive the assessment." Wilkes, 946 F.2d at 1150. Further, Judge Garbis ruled that "the IRS was not entitled to require

payment from the Taxpayer and is not entitled to retain the $15,381.01."

The IRS filed its Notice of Appeal of the decision on September 28, 1992. In a result oriented opinion, the Court of Appeals for the Fourth Circuit reversed, not on the issues before it, but on issues neither briefed nor argued by the parties in either forum. Without citation to authority, and in direct contradiction to existing case law, the Fourth Circuit found that the Taxpayer would receive a windfall if it upheld the District Court's decision. The Court then reversed because "...the taxpayer acknowledged in writing that it was not entitled to the refund," and, therefore, had "...waived any objection it may have had to collection of the erroneous refund." Goldstein, Baron &

Lewis, Chartered v. United States, 995 F.2d 35, 37 (4th Cir. 1993).

REASONS FOR GRANTING THE WRIT

I.

There is a conflict among federal courts regarding the validity of the IRS distinction between a "rebate" erroneous refund and a "non-rebate" erroneous refund.

In an attempt to circumvent a large body of case law that has developed against its position, the IRS has created a distinction between a "rebate" refund and what it calls a "non-rebate" refund. It maintains that a "rebate" refund exists when the amount reported by a taxpayer on a return has been assessed and paid, and, as a result of a redetermination of tax liability, the IRS returns a portion of the payment. A "non-rebate" refund

exists, it argues, when a refund made as the result of an error by the IRS in performing any function other than recomputing tax liability. According to the IRS argument, when a "non-rebate" refund is made, there is no satisfaction of the original assessment and, therefore, no need for any reassessment. Accordingly, in this instance, collection of the refund can be made pursuant to normal tax collection procedures.

The only support put forward by the IRS for this distinction is Internal Revenue Manual, I.R.M. 3(17)(79) 12.2:3, and a General Counsel Memorandum, G.C.M. 36624 (March 11, 1976). [2] Several courts, however, have adopted the argument as well

---

[2] It should be noted that both documents are marked with the warning label that "[t]his document is not to be relied upon or otherwise cited as precedent by taxpayers."

as its ramifications. See, Davenport v. United States, 91-2 U.S. Tax Cas. (W.D. Ky. 1991), Sanfellipo v. United States, 90-2 U.S. Tax Cas. (N.D. Cal. 1990), and Groetzinger v. Commissioner, 69 T.C. 309 (1977).

Other courts have correctly rejected the IRS' argument. United States v. Wilkes, 946 F.2d 1143 (5th Cir. 1991), United States v. Brown, 782 F. Supp. 321 (N.D. Tex. 1990), Rodrigues v. United States, 629 F. Supp. 333 (N.D. Ill. 1986), United States v. Young, 79-2 U.S. Tax Cas. (D. Del. 1979), La Follette v. United States, 176 F. Supp. 192 (S.D. Cal. 1959), and Goldstein, Baron & Lewis v. United States, 70 A.F.T.R.2d 92-5207 (D. Md. 1992). The courts in these cases have held that when a taxpayer has paid its assessed tax, the assessment is

extinguished. Accordingly, the IRS has only two options available: file suit for an erroneous refund under Section 6532(b) of the Internal Revenue Code (the "Code") or reassess the tax under Section 6501 of the Code and proceed with collections under Section 6502.

The courts faced with this issue have split as to the appropriateness and applicability of the "rebate/non-rebate" distinction. This case presents the Court with an opportunity to end the confusion generated by the existence of this split. Such a resolution would serve to provide both the government and taxpayers with a clear understanding of whether such a distinction is appropriate and to what extent the IRS may rely on extended limitations for its collection procedures.

Further, the Court's resolution of this issue by means of this case is appropriate in light of Fourth Circuit's failure to address the issue. That result oriented holding was not based upon issues raised and briefed by both parties, but, rather on an issue unaddressed by either party in the District Court or in the Court of Appeals. Furthermore, the foundation of the Court's decision was not even properly before it.

In this case, Judge Garbis rejected the argument of a "non-rebate" refund propounded in Groetzinger, Davenport, and Sanfellipo, relying upon the law as set out in Wilkes.

In Wilkes, a case on appeal from the United States District Court for the Western District of Texas, the Court of Appeals reversed the District Court and

held that the IRS was required to make a new assessment for the amount of income taxes which the IRS refunded to the taxpayer in error.

The Estate of Laura Mae McKeon filed its fiduciary income tax return and timely paid the taxes appearing on the return. The amount due had been incorrectly calculated to be $16,025.41, and not $16,243.58, the amount actually due and assessed by the IRS in September, 1982. As a result of an error by the IRS, the Estate was credited with an unrelated payment of $20,500. The IRS issued two refund checks to the Estate, saying that it had overpaid its taxes. The Estate had not requested either of the refunds.

Without making further assessments, the IRS filed suit in the United States District Court against the Estate seeking

to reduce to judgment the amount assessed against the estate in September, 1982. Both parties filed motions for summary judgment. The Estate argued that the IRS had failed to make an assessment within the three (3) year statute of limitations period under 26 U.S.C. 6501(a).

In finding for the taxpayer (except for the original "underpayment" of $218.11 which it found due and owing by the taxpayer), and relying on the authority of prior case law, the Court held that "The weight of authority holds that once a taxpayer makes payment of a tax assessment, the payment extinguishes the assessment to the extent of payment, and subsequent refunds do not revive the assessment." Wilkes, 946 F.2d at 1150.

This finding is clearly in direct conflict with the holdings in Groetzinger,

Davenport, and Sanfellipo. It is imperative that this issue be clarified to provide taxpayers with a clear understanding of any rights they have when they have relied, to their detriment, on decisions made by the IRS and its agents.

In this case, Judge Garbis had before him facts similar to those in Wilkes, Brown, Rodrigues, Young, and La Follette. The IRS made erroneous refunds to the taxpayers after the taxpayers had satisfied their assessed taxes. All these courts dealt with the issue of whether or not payment in full of an assessment, followed by an erroneous refund, extinguishes the assessment. However, in Wilkes and Brown, as in this case, the IRS additionally raised the questions of the existence of a "non-rebate" refund, and an

alleged distinction between a "rebate" refund and a "non-rebate" refund.

These courts all held that a payment in full extinguishes an assessment, and that the assessment is not revived by an erroneous refund. Additionally, as previously noted, the Wilkes and Brown courts rejected the IRS' "non-rebate" refund argument.

Therefore, because there is a split of authority as to the existence of a "non-rebate" refund and the extinguishment of an assessment following payment, and because the Fourth Circuit has avoided dealing with these issues even though presented, this Court should grant this petition for a writ of certiorari.

II.

The Court's consideration of the issue of waiver was clearly erroneous and contrary to case law authority.

Rule 8 (c) of the Federal Rules of Civil Procedure provides that among the affirmative defenses that shall be pleaded by a party is the defense of waiver. The IRS never asserted a defense based upon waiver either in its pleadings or in its argument on the motions for summary judgment. Nor was the issue raised sua sponte by the District Court either during the hearing or in its opinion.

For the Fourth Circuit to consider the issue, let alone base its holding on waiver, is clearly against well established case law authority. See, Phoenix Assurance Co. of New York v. Appleton City, 296 F.2d 787 (8th Cir.

1961), Atlas Assurance Co. v. Standard Brick & Tile Corp., 264 F.2d 440 (7th Cir. 1959), Armstrong v. Baker, 394 F. Supp. 1380 (N.D. W. Va. 1975), and Dairyland Ins. Co. v. Hughs, 317 F. Supp. 928 (W.D. Va. 1970).

III.

The Court's finding that the Taxpayer waived its right to object to the collection of the refund is in direct contradiction to well established law.

The Fourth Circuit refers to one of the Taxpayer's letter and states that the letter acted as a waiver of Taxpayer's rights. The Court fails to specify which of Taxpayer's letters acts as a waiver. After reviewing the records before the Court, the Petitioner assumes that the Court was referring to its letter to the IRS, dated March 6, 1986, which reads:

> We are in receipt of check number 3065 35453082 in the amount of $15,434.24. Under separate cover we received an explanation dated 2/17/86, Document Locator Number 28141-011-36128-6 for tax period Dec. 31, 1985.
>
> After reviewing my form 941's for 1985, I still do not understand why we are entitled to this refund.

Please review this matter and advise us.

The Court's holding that acknowledgment created a waiver ignores the IRS requirements for a valid waiver. [3] IRS regulations explicitly describe the steps necessary for an effective waiver to extend the limitations period for collection. Section 6502(a) of the Code

---

[3] Although the Fourth Circuit is unclear in its reference to waiver, Petitioner has interpreted waiver to mean that which would extend the statute of limitations for the IRS to recover the refund.

provides: "An extension or waiver of the normal period for collection is effective where (1) the agreement is in writing; (2) the agreement is entered into before the expiration of the six-year period [or the applicable period] or prior extension; and (3) the agreement is executed by both the taxpayer and an authorized delegate of the Commissioner." The requirement that such waiver agreement be signed by both parties is additionally supported by the Court's opinion in United States v. Cook, 494 F.2d 573 (5th Cir. 1974). There is no evidence in the record which meets these criteria, nor is any cited by the Fourth Circuit as there was never any agreement in writing, executed by both the Taxpayer and the IRS, to waive the normal collection period. At best, the evidence established acknowledgment of a refund and confusion

over the reason for it. Such an acknowledgment was not legally sufficient to establish a waiver of the Petitioner's rights.

Nor do the facts support a waiver under the common law. In Brookhart v. Janis, 384 U.S. 1 (1966), and Johnson v. Zerbst, 304 U.S. 458 (1938), this Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." Further, in 5 S. Williston, Law of Contracts section 678 (3rd ed. 1961), "[t]he assent [to waiver] must, however, be clearly established and will not be inferred from doubtful or equivocal acts or language." Clearly, there can be no inference of a waiver of rights by the Taxpayer in the March 6th letter. Nor did the Petitioner waive its rights at any other time. Certainly, the

IRS did not argue that a waiver had occurred.

Therefore, as there was never an acknowledgment or waiver by the Taxpayer, either through IRS procedures or otherwise, it retained its right to object to, and collect the erroneous refund.

CONCLUSION

This case presents this Court with an opportunity to settle the split of authority regarding whether and when the IRS is entitled to rely on the purported distinction between "rebate" and "non-rebate" refunds, to support its otherwise unauthorized collection procedures. It is an issue which Courts throughout the country have struggled with and for which there exists conflicting opinions.

Further, it is important that taxpayers be given clear notice of their

rights and the extent to which the IRS can, if at all, ignore its own procedures and regulations. These rights were, perhaps, best summarized by the court in Philadelphia & Reading Corp. v. United States, 944 F.2d 1063 (3rd Cir. 1991), in an opinion which resulted in an approximately six million dollar "windfall" for the taxpayer.

> It is unnecessary, however, for us to decide whether the district court erred in balancing the equities. It did not sit to decide the taxpayer's legal claim for refund as a court of equity. Rather, its duty was to decide whether the taxes at issue were illegally collected or retained....In cases where a statute of limitations has run, but Congress has made it clear that equitable considerations do not permit a court to avoid its strict application, the result can often seem harsh. In the realm of taxation, the effect of harsh procedural rules falls equally upon the taxpayers and the government....If our holding in this case seems to enforce

> the [IRS] procedural provisions so strictly as to work an inequity upon the government, there exist many other cases in which strict enforcement of the Internal Revenue Code's complex rules on the determination, assessment, levy and collection of taxes worked to the detriment of a taxpayer and the benefit of the government.

Id. at 1074-75.

Therefore, for all of the above reasons, the Petitioner respectfully requests that this Court grant its Petition and issue a Writ of Certiorari to the United States Court of Appeal for the Fourth Circuit on the questions presented.

Respectfully submitted,

Leonard R. Goldstein
4321 Hartwick Road,
Suite 300
College Park, MD 20740
(301) 699-9880
Counsel of Record for the
Petitioner

APPENDIX A

REPORTED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GOLDSTEIN, BARON & LEWIS,
CHARTERED

V. CIVIL ACTION NO.
MJG-90-521

UNITED STATES OF AMERICA

* * * * * * * *

MEMORANDUM AND ORDER

The Court has before it the parties' cross motions for summary judgment and the materials submitted by the parties relating thereto. The Court has held a hearing and has had the benefit of the arguments of counsel.

FACTUAL BACKGROUND

The parties agree upon the essential facts of this case so that, although nominally before the Court on cross motions for summary judgment, the case has

in substance been submitted for decision upon stipulated facts.

The operative facts can be stated succinctly:

1. Plaintiff, Goldstein & Baron, Chartered ("Taxpayer") in October 1985 filed its third quarter 1985 ("3Q85")

Form 941 accurately reporting the following:

Withholding Tax	$16,909.00
Social Security Tax	11,831.35
TOTAL TAX	$28,740.35
Deposits	27,212.36
DUE	$ 1,528.00

(paid by check)

2. The I.R.S. erroneously recorded the return as if it had reported a total liability of $11,831.35, with

deposits of $27,212.36, hence an overpayment of $15,381.01.

Accordingly, before the end of 1985, the I.R.S. assessed Taxpayers 3Q85 liability as $11,831.35 and credited the Taxpayer with $15,381.01 on its 4Q85 liability.

3. In January of 1986, Taxpayer, unaware of the I.R.S. error, timely filed its 4Q85 Form 941 accurately reporting the following:

Withholding Tax	$17,682.00
Social Security Tax	13,434.72
TOTAL TAX	$31,116.72
Deposits	31,136.16
OVERPAID	$ 19.44

4. On February 17, 1986, the I.R.S. refunded to the Taxpayer the following for 4Q85:

Erroneous Refund (credited from 3Q85)	$15,381.01
Interest	133.79
Actual 4Q85 over-payment	19.44
TOTAL	$15,434.24

5. By letter of March 6, 1986, Taxpayer advised the I.R.S. that it did not understand why it was entitled to the refund.

6. Neither the Taxpayer nor the I.R.S., nor both together, were able to figure out what had happened until (apparently) early 1988 when, it appears, the I.R.S. discovered its original error which by then had metasticized into many and varied problems.

7. In the first week of February of 1988, the I.R.S. made the following

entries on its records without making any assessments:

1. The $15,381.01 payment was removed from 4Q85.

2. The I.R.S. applied the $15,381.01 to 3Q85.

3. The Taxpayer's account for 4Q85 showed a $15,381.01 underpayment.

4. The Taxpayer's account for 3Q85 was adjusted to show a $15,381.01 liability offset by the application of $15,381.01 from 4Q85 to show a zero balance.

8. A notice dated February 15, 1988 was mailed to Taxpayer on February 22, 1988 stating that the I.R.S. had erroneously refunded $15,381.01 for 4Q85 and demanded repayment.

9. In March of 1988, Taxpayer paid the $15,381.01 under protest.

10. In October of 1989, Taxpayer filed a claim for refund of the $15,381.01.

SUBSTANTIVE DISCUSSION

While the "equities" of the case are irrelevant to the final decision, it is appropriate to note that they are not as one sided as might first appear. Of course, the Taxpayer is, in the end, seeking an apparent "windfall" of $15,381.01. However, the entire problem was caused by an I.R.S. error. Moreover, even without working out who did what to whom in the administrative process, it is readily apparent that the episode was not without cost (in time, effort and anxiety) to the Taxpayer.

Although it has been argued as if it were complex, the case is not. In February of 1988, the I.R.S. discovered that on February 17, 1986 it had made an erroneous refund of $15,381.01 of 4Q85 Form 941 taxes to the Taxpayer. At that time the I.R.S. had two legal options available to correct its error. It could have either:

1. File suit for erroneous refund under Section 6502 or

2. Made an assessment of $15,381.01 and pursued collection on that assessment.

The I.R.S. did neither. Instead, it took the position that it could rely upon the 4Q85 assessment made in January of 1986 ("the original assessment") in connection with the original return filing. Therefore, it simply proceeded to

obtain payment under protest from the Taxpayer.

The arguments made by the Government in this case have been considered by the United States Court of Appeals for the Fifth Circuit in United States v. Wilkes, 946 F.2d 1143 (5th Cir. 1991).[1] This Court will follow the decision in Wilkes which soundly rejected the I.R.S. argument based upon the theory of a "non-rebate

---

[1] On October 28, 1991, the Government filed a Motion to Apprise Court of Recent Decision which "announced" an unpublished October 18, 1991 District Court affirmance of a Bankruptcy Court decision approving the I.R.S. non-rebate refund theory. However, Government counsel overlooked, or chose not to advise the Court of, the November 12, 1991 contrary decision in Wilkes which was brought to the Court's attention on December 18, 1991 by Taxpayer's counsel. A long tradition of excellence and candor on the part of Tax Division attorneys has led the Court to expect more than it received here.

refund." Id. at 1148. This Court agrees with the conclusion in Wilkes that:

> The weight of authority holds that once a taxpayer makes payment on a tax assessment, the payment extinguishes the assessment to the extent of payment, and subsequent refunds do not revive the assessment.

Id. at 1150.

Here, the original 4Q85 assessment was extinguished when it was satisfied by its payment.[2] This assessment could not properly have been the basis for any collection from the Taxpayer. Accordingly, the I.R.S. had to make a new

---

[2] That payment was actually made by the application of deposits totalling $31,116.72 which was $19.44 more than was due. However, even if the payment were viewed as having been made by an erroneous credit from 3Q85 the situation would be no different.

assessment[3] or else file a timely suit for recovery of an erroneous refund. The Service did neither. Accordingly, the I.R.S. was not entitled to require payment and is not entitled to retain the $15,381.01 at issue herein.

FIRST FALLBACK DEFENSE - NO OVERPAYMENT

The Government asserts that the taxpayer cannot recover here because it has not established that it made an overpayment. In essence, the Government's argument boils down to the contention that since it could have timely made an assessment of $15,381.01 for 4Q85, the taxpayer cannot recover because it has not demonstrated that it paid more than its "correct" liability for 4Q85. This argument fails for several reasons.

---

[3] Which it certainly could have made at the time.

The Government's argument if accepted at face value would effectively disenfranchise taxpayers who were the victims of illegal collection activities. Hence, the Service could, with impunity, collect without ever making a timely assessment and defend a refund suit on the basis that had it troubled to make a timely assessment it could have done so. This Court does not see it as reasonable or rational that illegal collection -- such as done here by utilization of a filed federal tax lien based on an extinguished assessment -- is a substitute for assessment. The Government's argument is also directly contrary to the position taken by the same Government law office in another case before this Court. As stated in Blackston v. United States, 778 F.Supp. 244, n. 8 (D.Md. 1991):

In the cases of Sasscer v. United States, MJG-91-158 (D.Md.) the Government states:

> "This letter is in response to your order dated May 8, 1991, in which you requested the United States' position as to whether a taxpayer is entitled to a refund on the sole ground that the liability was collected by administrative levy in the absence of a notice and demand. The United States' position is that the taxpayer would be entitled to a refund, as long as he filed his claim for refund with the internal Revenue Service within two years from the time the funds were administratively collected."

In the Sasscer case, the Government recognized that a taxpayer would be entitled to a refund on the sole ground that there had been improper collection of an admittedly due tax debt. Hence the absence of an actual overpayment of liability would not stop the refund.

Finally, and perhaps most importantly, is the fact that in this case

the Taxpayer has actually made an overpayment of its liability for 4Q85. The Taxpayer's "correct" tax liability for 4Q85 was $31,116.72. The Taxpayer paid $31,136.16 for 4Q85 by means of deposits made during 4Q85. The Taxpayer then paid, in March of 1989, an additional $15,381.01 on its 4Q85 tax liability. Hence, as to 4Q85 this Taxpayer has paid, in real money directed and applied to the 4Q85 liability a total of $46,517.17 on a "correct" tax liability of $31,116.72 (of which $19.44) has already been refunded). Therefore Taxpayer has made an overpayment of $15,381.04[4] for 4Q85.

---

[4] Of course, this is not a sleight of hand. The Taxpayer has in fact made an underpayment of $15,381.01 on its liability for 3Q85. However, that period is not at issue here.

SECOND FALLBACK DEFENSE - VARIANCE

The Government argues that even though[5] it owes the taxpayer the refund on the merits, it can avoid payment by asserting that the grounds for refund were not specified in a claim for refund. As stated by Government counsel:

> Since plaintiff has not based its claim on the ground that the Service was required to make a new assessment, this ground may not now be raised...

An examination of the Government's assertion in the context of this case demonstrates that the variance fallback defense is without merit.

---

[5] Government counsel would use the word "if."

As stated in Garbis, Junghans & Struntz, Federal Tax Litigation Par. 17.02[3]:

> Whenever the Service asserts a variance defense, an issue arises as to what grounds or legal theories were raised and relied on in the refund claim on which the suit is based. It should be noted that the term "grounds for refund" encompasses not only the adjustment or item questioned but also the concept, reason, or theory justifying a refund. Sometimes, it is clear that a ground that the Service seeks to have dismissed was not raised in the refund claim on which the suit is based, but often a claim is general enough so that an argument can be made that no significant variance exists between the grounds raised in the taxpayer's complaint and those contained in his claim for refund. To make an argument, it is necessary to understand the reason for requiring specificity of claims. The purpose of requiring a specific claim for refund is to give the Service notice of the nature of the claim and either acknowledge its validity or prepare to defend against it. The Service is required to examine only those grounds to which its attention is directed. Generally, to successfully argue that no significant variance exists, a taxpayer must demonstrate that his

> claim for refund adequately apprised the Service of the grounds raised in his complaint. When contesting the issue, a taxpayer should assert that the averments allegedly varying from the claims are within the general language of the claim or are derived from or so integral to the grounds raised by the claim that the Service must have investigated and thus prepared to argue them. [footnotes omitted]

In March of 1989, the Taxpayer made the payment in issue in response to levy action threatened in enforcement of a tax lien filed in July of 1988. That tax lien was filed for 4Q85 and expressly stated that it was based on the original assessment which had been made in February, 1986. The claim for refund in issue plainly put the I.R.S. on notice that the taxpayer was taking the position that the Government's collection action and the filed tax lien which had caused the subject payment were improper. The Taxpayer mentioned further than any

erroneous refund suit was barred by the two year period of limitations.

It is readily apparent that any reasonable Internal Revenue Service employee assigned to review the subject claim would be focused upon the matter at issue, would recognize that the Taxpayer was complaining that the I.R.S. could not effect collection because the lien and its underlying assessment did not support collection and that no erroneous refund suit had been filed within two years of the refund. Further, the I.R.S. memorandum of November 2, 1989 rejecting the claim bases its rejection upon the fact that "money was transferred from [4Q85] to [3Q85] which created a balance due on Form 941 for [4Q85]." There is no doubt that the Service was focused on the pertinent issue and based its claim

rejection on its view that it could collect on an original assessment and did not have to make a new assessment or sue for erroneous refund.

The variance defense is not appropriately applied in this case. This is not a Taxpayer who addresses one item in a claim and sues on another. Nor can it even be said that the theory of the taxpayer's recovery varies. At most the Government may argue that the taxpayer, having clearly stated why it was right, did not fully set out each and every possible contention that the I.R.S. might make in its defense. While such a burden might in certain situations be appropriate, this is not one of them.

The I.R.S. should have been, and in fact was, made well aware by the claim for refund of the issues presented in this

case. The problem is that the Internal Revenue Service has consistently taken the position (rightly rejected by the Fifth Circuit in Wilkes) that it can proceed on its "non-rebate refund" theory and need not make a new assessment or sue for erroneous refund. That is the position which it intentionally followed when it collected the taxes at issue and the position which it knowingly applied when it rejected the Taxpayer's claim for refund. The issue of the validity of this position was squarely before the I.R.S. when it rejected the claim. That same issue was presented in this law suit. In the view of the United States Court of Appeals for the Fifth Circuit and this Court, the I.R.S. position is wrong.

CONCLUSION

For the foregoing reasons:

1. The Plaintiff's Motion for Summary Judgment is GRANTED.

2. The Defendant's Cross-Motion is DENIED.

3. By July 6, 1992 the parties shall submit an agreed Judgment Order or, absent agreement, separate proposed Orders for the closing of this case consistent with this Order.

a. An agreement on the Judgment Order to be entered is without prejudice to the parties' respective positions on the merits of the case.

b. Agreement as to the Judgment Order will not foreclose either

party from appealing from said Judgment Order.

SO ORDERED this 17th day of June, 1992.

Marvin J. Garbis
United States
District Judge

APPENDIX B

REPORTED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GOLDSTEIN, BARON & LEWIS, CHARTERED	:	
Plaintiff-Appellee	:	
V.	:	No. 92-2228
UNITED STATES OF AMERICA	:	
Defendant-Appellant	:	

Appeal from the United States District Court for the District of Maryland, at Baltimore, M.J. Garbis, District Judge. (CA-90-521-MJG)

Argued: March 30, 1993

Decided: June 4, 1993

Before RUSSELL and NIEMEYER, Circuit Judges, and CHAPMAN, Senior Circuit Judge

---

Reversed by published opinion, Judge Russell wrote the opinion, in which Judge Niemeyer and Senior Judge Chapman jointed.

OPINION

RUSSELL, Circuit Judge:

In this case, the Internal Revenue Service ("IRS") appeals from a district court order granting summary judgment to the plaintiff, Goldstein, Baron & Lewis ("the taxpayer"), for a refund of federal withholding taxes. Because we conclude that the taxpayer waived any objection it may have had to the collection of the funds, we reverse.

I.

The parties stipulated to the following facts. On October 30, 1985, the taxpayer submitted its third quarter (3dQtr.) employment tax return and accurately reported the following:

Withholding tax	$16,909.00
Social Security Tax	$11,831.35
TOTAL TAX	$28,740.35
Deposits	$27,212.36
AMOUNT DUE	$ 1,528.00

The taxpayer submitted the $1,528.00 due with the return.

Upon receipt, the IRS erroneously recorded the return as reporting a total tax due of $11,831.35, with deposits of $27,212.36. Therefore, on October 31, 1985, the IRS credited the taxpayer's account by $15,381.01 (which incidentally fails to consider the $1,528.00 payment). On December 2, 1985, the IRS assessed a 3dQtr. liability of $11,831.35.

In January of 1986, the taxpayer filed a fourth quarter (4thQtr.) employment tax return that accurately reported the following:

Withholding tax	$17,682.00
Social Security tax	$13,434.72
TOTAL TAX	$31,116.72
Deposits	31,136.16
OVERPAID	$ 19.44

Because of the erroneous credit from the 3dQtr., the IRS refunded the following amount to the taxpayer:

Erroneous refund	$15,381.01
Interest	$ 133.79
4thQtr. Overpayment	$ 19.44
TOTAL	$15,434.24

The IRS assessed the 4th Qtr. liability on February 17, 1986. Upon receipt of the refund, the taxpayer advised the IRS that it did not understand why it was entitled to the refund.

In February of 1988, the IRS discovered its error and reversed the 4thQtr. credit by making the following

entries on its records, without making any assessments:

1. Removed $15,381.01 payment from the 4th Qtr.
2. Applied $15,381.01 to the 3dQtr.
3. Balance the 3dQtr. to zero.
4. Showed a 4thQtr. liability of $15,381.01.

The IRS sent the taxpayer notice of the erroneous refund on February 15, 1988, and demanded repayment of the money. The taxpayer paid the $15,381.01 in March of 1989, under protest, and filed a claim for refund of the money in October of 1989. After the IRS denied the claim on November 2, 1989, the taxpayer filed this suit on February 14, 1990.

After stipulating to the above facts, both parties filed motions for summary judgment. In its motion, the taxpayer

argued that in order to recover the erroneous refund, the IRS had to bring suit under 26 U.S.C. Section 7405 within two years of the date of refund, as required by 26 U;S.C. Section 6532(b). The taxpayer reasoned that because the IRS failed to do this, the $15,381.01 payment constituted an overpayment under 26 U.S.C. Section 6401, and should therefore be refunded. The IRS, on the other hand, argued that no Section 6401 overpayment existed because it had six years under 26 U.S.C. Section 6502(a) from the date of the 4thQtr. assessment to collect taxes for that quarter. The IRS also argued that because the taxpayer actually owed the money, there was no overpayment.

At oral argument, the district court disagreed with the parties' view of the case, and ordered that the parties file

supplemental briefs on what he was as the central issue: whether a new 4thQtr. assessment had to be made following reversal of the erroneous credit for that quarter. In response to the court's inquiry, the IRS argued that because the erroneous refund was what it termed a "non-rebate" refund, a new assessment was unnecessary. The taxpayer asserted, however, that the IRS's authority for its "rebate/non-rebate" distinction had no weight, and that because the IRS could not cite any authority to support its novel theory, summary judgment in its favor was appropriate. The district court agreed with the taxpayer, and granted summary judgment in its favor. The IRS appeals.

II.

The IRS argues that it was not required to follow the statutory

assessment procedure to recover the taxpayer's erroneous refund in this case because the refund was a "non-rebate" refund. Although we conclude that the IRS is entitled to the funds in this case, we reach that conclusion by a different route than that advanced by the IRS.

The IRS contends in this case that it was not required to make a new assessment for the 4thQtr. because the original assessment was not extinguished by the taxpayer's payment. The critical fact that leads us to reverse the district court in this case, however, is the fact that the taxpayer acknowledge in writing that it was not entitled to the refund. Indeed, no one contests the fact that the taxpayer owed the money; the taxpayer's sole contention is that the IRS should be required to follow its established

procedures for collecting erroneous refunds. Although we agree with that proposition, the taxpayer's acknowledgement of the legitimate tax debt owed to the IRS waived any objection it may have had to collection of the erroneous refund. In this case, the IRS could have recovered the funds due, without the burden of this suit, had it followed the well-accepted procedures for collection of erroneous refunds. In addition, had the taxpayer acknowledged that it was not entitled to the windfall it received from the IRS and paid the funds when the error was clarified, both parties could have avoided the burden of this suit. In light of the taxpayer's legitimate debt to the IRS and the taxpayer's acknowledgement that it was not entitled to the refund, we conclude that

the IRS is entitled to the funds paid under protest in this cases.

III.

Because we conclude that the taxpayer's letter to the IRS waived any objection it may have had to the collection of the funds it legitimately owed the IRS, we reverse the district court to allow the IRS to retain the funds paid by the taxpayer for the erroneous refund.

REVERSED

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 29, 1993

No. 92-2228
CA-90-521-MJG

GOLDSTEIN, BARON & LEWIS, CHARTERED

Plaintiff - Appellee

v.

UNITED STATES OF AMERICA

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellee's petition for rehearing and suggestion for rehearing in banc was submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

APPENDIX D

Internal Revenue Code of 1986 (26 U.S.C.):

SEC. 6201. ASSESSMENT AUTHORITY.

(a) Authority of Secretary.--The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law.

SEC. 6203. METHOD OF ASSESSMENT.

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

SEC. 6501. LIMITATION ON ASSESSMENT AND COLLECTION.

(a) General Rule.--Except as otherwise provided in this section, the amount of ny tax imposed by this title shall be assessed within 3

years after the return was filed (whether or not such return was filed on or after the date prescribed) or,

if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

(b) Time Return Deemed Filed.--

* * * * * * * *

(2) Return of certain employment taxes and tax imposed by chapter 3.--For purposes of this section, if a return of tax imposed by chapter 3, 21, or 24 for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

* * * * * * * *

SEC. 6502. COLLECTION AFTER ASSESSMENT

(a) Length of period.--Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun--

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by this subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer.

SEC. 6532. PERIODS OF LIMITATION ON SUITS.

* * * * * * * *

(b) Suits by United Stares for Recovery of Erroneous Refunds.--Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund, except that such suit may be brought at any time within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.

* * * * * * * *

SEC. 7405. ACTION FOR RECOVERY OF ERRONEOUS REFUNDS

(a) Refunds after limitation period.--Any portion of a tax imposed by this title, refund of which is erroneously made, within the meaning of section 6514, may be recovered by civil action brought in the name of the United States.

(b) Refunds otherwise erroneous.--Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be considered as erroneous under section 6514) may be recovered by civil action brought in the name of the United States.

(c) Interest.--For provision relating to interest on erroneous refunds, see section 6602.

(d) Periods of limitation.--For periods of limitations on actions under this section, see section 6532(b).